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IN THE

Supreme Court of the United States

October Term, 1965
No. 965

GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 22, 1965.

Opinion Below.

No written opinion was filed by the District Court herein. The opinion of the Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court herein, is reported at 351 F. 2d 898 (9th Cir. 1965) and is attached hereto as Appendix A.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 22, 1965. Petitioner filed a Petition for Rehearing on November 22, 1965. Rehearing was denied on December 2, 1965. Time to file this petition was ex-

tended by the Honorable William O. Douglas to and including January 31, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Is a taxpayer deprived of his right to counsel under the Sixth Amendment to the United States Constitution when investigating agents of the Internal Revenue Service, after suspecting the taxpayer of criminal tax fraud, elicit incriminating statements and documents from the taxpayer, without informing him of his rights to counsel or to remain silent, and such statements and documents are admitted in evidence against the taxpayer in a criminal tax fraud trial?

Constitutional Provision and Statutes Involved.

The constitutional provision involved is that portion of the Sixth Amendment to the United States Constitution which provides:

> "In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The statutory provisions involved are portions of the Internal Revenue Code, 26 U.S.C. §§7201 and 7206(1). They are set forth in Appendix B hereto.

Statement.

A. Proceedings Below.

Petitioner was convicted, after a trial before a jury in the United States District Court for the Southern District of California, Central Division, of a willful attempt to evade or defeat federal income taxes for the years 1958 and 1959, and of willfully falsifying federal income tax returns for the years 1958 and 1959. The

District Court sentenced appellant to one year's imprisonment on each of the final counts of a six-count indictment, said sentences to run concurrently, and imposed a fine of $10,000 as to count three of the indictment. Judgment was rendered on June 20, 1964.

An appeal was taken to the Court of Appeals for the Ninth Circuit under 28 U.S.C. §§1291 and 1294(1). The appeal was argued before the Honorable Richard H. Chambers and the Honorable Ben C. Duniway of the Court of Appeals for the Ninth Circuit, and the Honorable William J. Jameson, District Judge. On October 22, 1965, an opinion was rendered by the Court of Appeals affirming the judgment of the District Court and holding, *inter alia,* that petitioner had not been deprived of his right to counsel under the Sixth Amendment at any stage of the proceeding. A Petition for Rehearing was filed with the Court of Appeals on November 22, 1965, and was denied on December 2, 1965. Time to file this Petition was extended to and including January 31, 1966, by the Honorable William O. Douglas on December 30, 1965.

B. Facts.

The basic facts involved in this case as set forth in the opinion of the Court of Appeals are substantially as follows: Appellant was a member of a partnership engaged in farming and related enterprises, including the operation of a farm labor camp. In 1958 and 1959 the partnership also constructed a trailer park. Appellant was engaged in the management of the partnership and maintained and prepared its financial records. His income was his distributive share of the partnership income. It was undisputed that there was unreported income for the three taxable years involved, and that

for 1957 and 1958 the amounts were substantial. The unreported income consisted of receipts from sales of farm produce and from the farm labor camp operations, and excess depreciation on the trailer park in 1959. As the court stated, ". . . the crucial issue was whether appellant's understatements of income were willful" (351 F. 2d at 899).

Since the issue raised by this Petition is whether or not the doctrine of *Escobedo v. Illinois,* 378 U.S. 478 (1965), applies to a criminal tax fraud investigation, the facts of the investigation by agents of the Internal Revenue Service in this case must be discussed in detail.

In June, 1960, the Government initiated a routine audit of petitioner's 1958 income tax return [R. 104]. During the following twelve months, Revenue Agent Valgene T. Stapley and petitioner met on several occasions during which petitioner voluntarily turned over any and all accounting records requested by Agent Stapley [R. 104-136]. These records were returned to petitioner in December, 1960 [R. 118]. At some point after December, 1960, and before June, 1961, Agent Stapley visited petitioner's bank and examined its records concerning petitioner's bank accounts [R. 121, 180]. On June 23, 1961, Agent Stapley informed petitioner that the bank deposit records revealed deposits in excess of the income reported on petitioner's 1958 tax return [R. 122]. Petitioner was unable to account for this discrepancy, and requested additional time to seek an explanation for it [R. 122]. Clearly, an inference of unreported income was present at this point in the investigation.

Subsequently, Agent Stapley learned that the cancelled checks reflecting petitioner's expenses for the construction of the trailer park did not reflect the total

cost of construction claimed as the basis of the trailer park for depreciation purposes on petitioner's 1959 income tax return. At a meeting on July 17, 1961, Stapley questioned petitioner about this problem [R. 127]. Petitioner attempted to explain this discrepancy by stating that he had made "cash payments" totaling $60,000 for construction of the trailer park [R. 124-128]. Stapley also told petitioner at the July 17 meeting that he did not think petitioner's method of computing depreciation on the trailer park "would be acceptable" [R. 176]. It is clear that by the July 17 meeting Agent Stapley suspected unreported income, because he then informed petitioner that "adjustments might be in order" [R. 176] and in fact went so far as to state "that certain adjustments were apparent" [R. 177].

It is also apparent that Agent Stapley, after hearing of the purported cash payments of $60,000, believed a more thorough investigation was necessary, because he "borrowed" petitioner's accounting records, cancelled checks and bank statements and, for the first time, gave petitioner a receipt for the documents taken [R. 183]. Although Agent Stapley testified that it was "ordinarily" the procedure to give a taxpayer a receipt for documents, the procedure was not followed in this case before the July 17 meeting [R. 154].

On or about July 28, 1961, Agent Stapley returned to petitioner's home and again discussed his tax liability for 1958 and 1959 [R. 128]. At this meeting, Agent Stapley again referred to the fact that the income reported on the 1958 return did not agree with the bank deposits for that year, in that "there was still more money going through the bank than is shown on the income tax return" [R. 129]. In an attempt to explain

this discrepancy petitioner told Agent Stapley that he had taken $40,500 in cash from a safe deposit box and deposited it in the bank accounts in 1958 [R. 130]. At trial, petitioner admitted that he "did not have any cash in a safe deposit box" [R. 714].

It is clear that petitioner's attempt to explain unreported income and excess depreciation deductions by referring to unrecorded "cash payments" caused Agent Stapley to suspect petitioner of criminal tax fraud, because: (a) he immediately reduced the statement about the $40,500 payment to writing and had petitioner sign it [R. 130-131]; and (b) within a few days thereafter, Stapley referred the investigation to the Intelligence Division (Fraud) of the Internal Revenue Service [R. 199-200].

At trial, the signed statement referred to above was introduced in evidence and relied upon heavily by the prosecution as evidence of petitioner's "willfulness" [R. 928, 929, 977, 978].

Special Agent Charles Vitello of the Intelligence Division, whose duties are to conduct criminal tax fraud investigations [R. 137, 207], was designated to continue the investigation. He received certain documents from Agent Stapley and made photocopies of them on September 13, 1961 [R. 233-238]. Revenue Agent Stapley made an appointment with petitioner [R. 318] and on September 14, 1961, he accompanied Special Agent Vitello to petitioner's home [R. 306]. Although Special Agent Vitello showed his credentials at this meeting [R.

318], he did not discuss those credentials nor distinguish between his status and that of Agent Stapley, nor tell petitioner he was conducting an investigation because of criminal possibilities in the case, nor mention to petitioner the possibility of his retaining an attorney [R. 318-321].

Petitioner underwent extensive interrogation by Special Agent Vitello at the meeting on September 14, and at meetings on September 20 and October 13, 1961 [R. 306-318]. During these meetings, petitioner made certain admissions of unreported income (*e.g.*, petitioner said "My analysis of the bank deposits show that I understated the 1958 partnership income by $20,000") which Special Agent Vitello testified to at trial [R. 311-313]. Petitioner also allowed Special Agent Vitello to "borrow" certain cancelled checks (reflecting his expenditures), accounting records and other documents [R. 310-311]. At the meeting on September 20, 1961, petitioner asked Special Agent Vitello "what arrangements he could make with the Government to pay whatever tax determination resulted from the investigation" [R. 313] to which Special Agent Vitello replied that "in time [petitioner] would be given adequate opportunity to make such arrangement" [R. 313], and later said that "in due time the Government would accede to whatever financial arrangements could be arranged" [R. 335].

In November, 1961, Special Agent Vitello turned over the investigation to Special Agent John Lines of the In-

telligence Division [R. 341]. The mutual group supervisor of both agents gave Lines all the documentary materials collected from petitioner up to that time [R. 341, 372]. Special Agent Lines conducted the investigation, outside of the presence of petitioner, until May 10, 1963. On that day, Lines held a "question and answer conference" with petitioner. At this meeting Special Agent Lines read the "admonition" to petitioner, informing him that he would not have to "say anything at that meeting or produce any evidence which might incriminate him under any of the federal laws. . . ." [R. 353, 376]. Admittedly Special Agent Lines' "admonition" took place after the government received virtually all of the documents petitioner had [R. 376]. Lines also admitted that "substantially all" of the leads to customers of the partnership (and thus to sources of farm income) came from documents turned over by petitioner [R. 372].

Petitioner testified that he first learned that he was being investigated with the possibility of criminal prosecution in August, 1963 [R. 710]. There is no evidence in the record that petitioner was advised of his right to counsel or represented by counsel at any stage of the investigation.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Is in Clear Conflict With the Decision of This Court in Escobedo v. Illinois, 378 U.S. 478 (1964).

This case involves a crucial constitutional question: *At what point during a criminal tax fraud proceeding does the taxpayer's Sixth Amendment right to counsel attach?* In this case, agents of the Internal Revenue Service conducted an investigation lasting more than three years without informing petitioner of his rights to counsel or to keep silent, during which time petitioner made incriminating statements and, at the request of the agents, made available incriminating documents which were of essential importance in securing his subsequent conviction for criminal income tax evasion. In affirming petitioner's conviction, the court below appears to have held that the Sixth Amendment, as interpreted by this Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964), does not require that a taxpayer be warned of his rights to counsel or to remain silent *during any stage of a criminal tax investigation.*[1] The essence of the decision of the court below can be found in the following paragraphs:

> "In support of his contention that his constitutional rights were violated, appellant relies primarily upon Massiah v. United States, 1964, 377 U.S.

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[1]That the Court's opinion is susceptible of this interpretation is clear from legal newspaper headlines referring to the case: "Escobedo Not Applicable During IRS Agents' Tax Return Investigation" (Los Angeles Metropolitan News, November 1, 1965); "Escobedo Rule Held Inapplicable to Government Income Tax Audits" (Los Angeles Daily Journal, November 2, 1965).

201, 84 S.Ct. 1199, 12 L.Ed.2d 246, and Escobedo v. State of Illinois, 1964, 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed. 2d 977. Counsel have not cited, nor have we found, any cases applying either Massiah or Escobedo in a case involving an income tax investigation. It is necessary accordingly to consider rather precisely what was held in both cases and their impact upon a case of this nature.

"In Massiah the defendant, under indictment for violation of the narcotic laws, had retained counsel and was free on bail when, out of the presence of his attorney, he made incriminating statements to a co-defendant, who, without Massiah's knowledge, had agreed to become a witness for the Government. The statements were overheard by federal agents who had installed radio equipment in the co-defendant's car. The court, in referring to the guarantee of the Sixth Amendment, said:

> 'We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.' (377 U.S. at 206, 84 S.Ct. at 1203).

"In Escobedo the defendant made incriminating statements during a period of police interrogation after he was arrested and after his request to see his attorney had been denied. In reversing his conviction, the Court said:

> 'We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a

particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," Gideon v. Wainwright, 372 U.S. [335], at 342, [83 S.Ct. 792, at 795, 9 L.Ed.2d 799], and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.' (378 U.S. at 490, 84 S.Ct. at 1765).

"In taking the phrase 'focus on a particular suspect' out of context, appellant would extend the rule of Escobedo beyond any logical implication of the effect of that decision. The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested." (351 F.2d at 901).

Petitioner respectfully urges that the court below misconstrued *Escobedo v. Illinois* and that its decision is fundamentally wrong. Petitioner contends when an agent of the Internal Revenue Service discovers evidence

of criminal income tax fraud and sets in motion an investigation for the purpose of obtaining incriminating evidence from the taxpayer, the investigation is no longer investigatory but accusatory, and the taxpayer must be warned of his right to counsel and to remain silent.

A. The Investigation in the Present Case Became Accusatory No Later Than the Final Meeting of Petitioner and Revenue Agent Stapley in Late July, 1961, and Thereafter the Purpose of the Investigating Agents Was to Elicit Incriminating Evidence From Petitioner.

In *Escobedo v. Illinois, supra,* this Court held that the Sixth Amendment right to counsel applies during a pre-trial police investigation[2] when the investigation becomes "accusatory" and the purpose of the investigators is to elicit incriminating evidence from the accused (378 U.S. at 492). It is at this critical stage of the investigation, when the accused is most apt to incriminate himself unwittingly, that legal aid and advice are clearly needed if the trial is to be anything more than "an appeal from the interrogation." (378 U.S. at 487).[3] This emphasis on the *need* of the accused for counsel is at

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[2]The criminal investigators in the present case were agents of a federal administrative agency rather than local police. It seems clear, however, that this distinction is not constitutionally significant, at least where the agents of the administrative body are performing a function identical to that of police investigators, *i.e.,* interrogating the accused with the purpose of eliciting incriminating evidence from him. See *In re Groban,* 352 U.S. 330, 337-353 (Justices Black, Douglas, Brennan and Chief Justice Warren dissenting); see also Krohnke, "The Constitutional Right to Counsel in Tax Investigations," 33 U. Chi. L. Rev. 134 (1965); Enker and Elsen, "Counsel for the Suspect: *Massiah v. United States* and *Escobedo v. Illinois,*" 49 Minn. L. Rev. 47, 75 (1964).

[3]See *United States ex rel. Russo v. New Jersey,* 351 F. 2d 429, 435 (3d Cir. 1965) ("We conclude that it is now the law that the right to counsel is present at every critical stage of the proceedings").

the heart of the *Escobedo* decision, and is the key to a proper application of that decision in criminal tax investigations.[4]

In the present case, the investigation became accusatory no later than the final meeting in July, 1961, between petitioner and Revenue Agent Stapley. For more than a month, Stapley had confronted petitioner with the fact that his bank deposits for the year 1958 exceeded the income reported on his 1958 income tax return, and petitioner had been unable to give an adequate explanation for this discrepancy [R. 122-129]. Similarly, petitioner had been unable to account for apparent excess depreciation deductions taken on the trailer park [R. 127-135]. Then, at the final meeting in July be-

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[4]In *Escobedo* this Court noted that the accused was undoubtedly unaware that his admission of complicity in the murder plot was legally as damaging as an admission of the actual shooting, and that the "guiding hand of counsel" was essential to advise the accused in "this delicate situation." (378 U.S. at 486) Petitioner submits that the taxpayer subjected to criminal investigation (as was petitioner in the present case) finds himself in a situation even more "delicate" than that of Danny Escobedo. First, the accused in a criminal tax investigation, unlike Escobedo, may be wholly unaware that he is being investigated for criminal purposes. See Redlich, "Searches, Seizures, and Self-Incrimination in Tax Cases," 10 Tax L. Rev. 191, 211 (1954). Even if he is aware of the criminal nature of the investigation, however, the accused taxpayer must make a decision of the utmost delicacy and with the most serious consequences: to "cooperate or not to cooperate" with IRS agents. Tax experts have repeatedly emphasized the critical nature of this decision and the inability of most taxpayers to make it properly without the aid of counsel. See, *e.g.*, Balter, *Tax Fraud And Evasion*, Chapter 6 (3d ed. 1963); Bender, "Taxpayers' Rights in Special Investigations," 15 N.Y.U. Inst. Fed. Tax. 1285, 1300 (1957); Heckerling, "Tax Fraud Investigations: Cooperative or Adversary Proceedings?" 39 Taxes 807, 810 (1961). Many taxpayers, unadvised by counsel, choose to "cooperate" with IRS agents and, like petitioner in the present case, unwittingly incriminate themselves by providing the Government with evidence supporting a criminal tax fraud prosecution.

tween petitioner and Revenue Agent Stapley, petitioner offered a new "explanation" for the excess of bank deposits over reported income—a purported transfer of $40,500 in cash from a safe deposit box to the bank accounts. [R. 130]. At this meeting, Stapley's investigatory technique changed radically: he immediately prepared a written statement reflecting petitioner's statement about the cash taken from a safe deposit box and had petitioner sign this statement [R. 130-131]. This written statement was heavily relied upon by the prosecution at trial as evidence of petitioner's willfulness [R. 928, 929, 977, 978]. The only reasonable inference from these facts is that at least by the time of this meeting in late July, 1961, Revenue Agent Stapley strongly suspected petitioner of criminal income tax fraud and was investigating petitioner with a view to obtaining incriminating evidence from him. The investigation clearly had become accusatory and petitioner's need for the aid and advice of counsel had become critical by that time.

Within several days after the meeting referred to above, the case was referred to Special Agent Charles Vitello of the Intelligence Division of the Internal Revenue Service [R. 135-136, 191]. Special Agent Vitello, whose function is to conduct *criminal tax fraud investigations* [R. 137, 207], took from Revenue Agent Stapley certain documents which he had obtained from petitioner and made photostatic copies of them [R. 233-238]. Then, on September 14, 1961, Special Agent Vitello, accompanied by Revenue Agent Stapley (who had no responsibility for the investigation after the July 28 meeting), met with petitioner and interrogated him concerning his financial affairs [R. 306]. During that

meeting and several subsequent meetings, Special Agent Vitello obtained several oral admissions from petitioner and took additional accounting records and cancelled checks from him, making photostatic copies of them [R. 311-313, 233-235]. Special Agent Vitello testified to these damaging admissions at trial [R. 311-313]. And the accounting records taken from petitioner by Special Agent Vitello provided the Government with important leads to customers of the partnership, and thus to sources of unreported farm income [R. 372, 915]. Even if it be concluded that the investigation had not become accusatory while Revenue Agent Stapley was in charge of the investigation, it is abundantly clear that the accusatory stage was reached by the time Special Agent Vitello entered the case.

B. Neither Arrest, Custody, Indictment nor the Apparent Existence of a Crime Are Necessary for the Sixth Amendment Right to Counsel to Attach in a Criminal Tax Investigation.

In attempting to distinguish *Escobedo v. Illinois* from the present case, the court below reasoned as follows:

> "In taking the phrase 'focus on a particular suspect' out of context, appellant would extend the rule of Escobedo beyond any logical implication of the effect of that decision. The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the Revenue Agents was whether in fact any crime had been committed. The accused had not been indicted or arrested." (351 F. 2d at 901.)

The meaning of the quoted passage is far from clear and, indeed, one of the compelling reasons for granting certiorari in the present case is to remove the confusion which has been created in the minds of revenue agents, taxpayers and their counsel by the decision of the court below. The court appears to have held, however, that at least one of the following four elements must be present before a taxpayer subject to criminal investigation is entitled to be warned of his constitutional rights to counsel and to remain silent:

(1) The taxpayer must be taken into custody; or

(2) The taxpayer must be arrested; or

(3) The taxpayer must be indicted; or

(4) The existence of a criminal violation of the Internal Revenue laws must be apparent.

Such a rule would empty the Sixth Amendment "right" to counsel of all meaning in a criminal tax case.

Indictment. It is apparent that the return of an indictment is not necessary for the Sixth Amendment right to counsel to attach during the interrogation stage of a criminal proceeding. The defendant in *Escobedo v. Illinois* had not been indicted at the time the investigation shifted from the investigatory to the accusatory stage, thereby causing his right to counsel to attach.

Arrest and Custody. A brief examination of the nature of a criminal tax investigation reveals the total inadequacy of a rule conditioning the taxpayer's right to counsel on arrest or custody. The typical pattern of investigation leading up to a criminal tax fraud prosecution (the pattern followed in the present case) is as follows: The taxpayer is contacted initially by a Revenue

Agent who conducts a "routine audit" of his return. Upon discovering evidence indicating possible criminal tax fraud, the Revenue Agent refers the matter to the Intelligence Division of the local District Director's office, where a Special Agent, whose function is to conduct criminal tax investigations,[5] assumes responsibility for the investigation. The Special Agent, after examining the materials accumulated by the Revenue Agent, is introduced to the taxpayer by the Revenue Agent, usually at an informal meeting in the taxpayer's home or office. The Special Agent shows the taxpayer his "credentials," which identify him as a "Special Agent" but do not indicate that he is a criminal investigator [R. 318]. The Special Agent does not tell the taxpayer of the criminal possibilities in the case, and says nothing to indicate that he is doing anything but working with the Revenue Agent in carrying on the same type of investigation conducted by the Revenue Agent before the Special Agent entered the case. The Special Agent holds a series of informal conferences with the taxpayer during which he interrogates the taxpayer in an attempt to obtain incriminating statements. The Special Agent also attempts to obtain incriminating documentary evidence from the taxpayer. At a later stage in the investigation the Special Agent may hold a "question and answer conference," at which the taxpayer is interrogated under oath and his testimony is recorded. By these techniques, the evidence to be used in

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[5]Paragraph 678 of the Manual of Instructions for Revenue Agents provides: "In joint investigations the Special Agent will be responsible for the criminal features of the case *and for the procurement of appropriate proof to establish the charge should prosecution be authorized.*" (Emphasis added) See Avakian, "Rights and Remedies of Taxpayers Suspected of Fraud," 33 Taxes 878, 879 (1955).

a subsequent criminal tax fraud prosecution is gathered with the "cooperation" of the taxpayer. *At no point is the taxpayer arrested or taken into custody.*[6]

From the foregoing description of the nature of a criminal tax investigation, it is apparent that a rule conditioning the taxpayer's right to counsel upon arrest or custody would deprive him of the aid and advice of counsel during the most critical stage of the investigation. Unlike other crimes, where police investigators arrest prime suspects and interrogate them in custody at police headquarters, criminal tax investigators rely on the "cooperation" of the accused, and build the prosecution's case without taking the taxpayer into custody or arresting him. Clearly, in a criminal tax investigation the accusatory stage, when the taxpayer is most apt to incriminate himself unwittingly, is reached *before* the taxpayer is arrested or taken into custody. By requiring arrest or custody for the taxpayer's right to counsel to attach, the court below has ignored the essential meaning of *Escobedo v. Illinois* and has rendered the Sixth Amendment right to counsel ineffective in a criminal tax case.

It must be emphasized that the court below was *not* compelled by any decision of this Court to find that arrest or custody are prerequisites to a taxpayer's right to counsel. In *Massiah v. United States,* 377 U.S. 201 (1964), the accused was free on bail and *not in custody* when Government agents unconstitutionally obtained incriminating evidence from him outside the pres-

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[6]For enlightening descriptions of IRS investigative techniques, see Ludlam, "Tax Fraud Investigations: A Plea For Constitutional Procedures," 43 A.B.A.J. 1009 (1957); Avakian, *supra* note 5, at 879; Bender, *supra* note 4, at 1285-1289; Mortenson, *Federal Tax Fraud Law,* §19 (1958 ed.).

ence of his counsel. (377 U.S. at 202). It is also important to note that since *Escobedo v. Illinois* was decided some courts have properly recognized that arrest or custody are not central to the rule of that case. In a recent case, *People v. Furnish,* 63 Adv. Cal. 536 (1965), the California Supreme Court reversed a conviction of second degree murder solely on the ground that defendant had not been informed of his rights to counsel and to remain silent. The police obtained confessions from the defendant without formally arresting him. The court held that the investigation had become accusatory and defendant's right to counsel had attached despite the lack of a formal arrest:

> "Of course in some situations where an investigation has focused on a particular suspect the authorities may, for reasons of their own and without advising the suspect, choose to detain him although he had not been formally placed under arrest. In that case the danger that such tactics may result in incriminating statements is as great as if the suspect had been formally arrested. In other words, if the formality of an arrest were a strict condition precedent to the advent of the accusatory stage, the police could, by delaying the arrest where the situation did not demand one, circumvent the accused's right to counsel and nevertheless subject him to tactics designed to elicit incriminating statements.
>
> "We are satisfied that, although an arrest ordinarily signals the advent of the accusatory stage, the fact of an arrest is not essential to the maturing of that stage. Rather, in determining whether such stage has been reached, all of the circumstances

> must be considered, including such factors as the evidence of guilt in the possession of the police, the pressures short of arrest which the police exert to detain the suspect, and other factors which may subject the suspect to unusual pressures." (63 Adv. Cal. at 540-541).

Petitioner submits that the reasoning of the California Supreme Court in *People v. Furnish* applies, *a fortiori,* to a criminal tax investigation where Government agents invariably subject the taxpayer to "tactics designed to elicit incriminating statements" without arresting him.

Another recent California decision takes an equally sound approach to the effect of *custody* on the right to counsel under *Escobedo v. Illinois.* In *Ballard v. Superior Court,* 44 Cal. Rptr. 291 (1965) (hearing granted by California Supreme Court June 30, 1965 and argued January 6, 1966), police investigators arranged for an alleged rape victim to telephone the accused, while the police recorded the conversation. During the conversation the defendant made certain damaging admissions. The defendant moved to suppress the recordings and transcripts of them on the ground, *inter alia,* that they were obtained after the investigation had reached the accusatory stage and defendant had not been warned of his rights to counsel and to remain silent. Defendant also moved for an order allowing him to inspect the results of a lie-detector test which had been given by the police to the alleged victim prior to the incriminating telephone conversation. Defendant contended that the results of this test were the main source of objective evidence showing that the police officers believed in defendant's guilt and were attempting to elicit incriminating statements by recording the telephone conversation

between the alleged victim and the defendant. The District Court of Appeal ordered the Government to allow defendant to inspect the results of the lie detector test, and rejected the Government's contention that the doctrine of *Escobedo v. Illinois* could not apply because the defendant had not been taken into custody when the incriminating statements were made. In referring to the *Escobedo* doctrine (as elaborated in the leading California case of *People v. Dorado,* 62 Cal. 2d 338 (1965)), the Court stated:

> "We do not believe custody is essential to the reason for or application of the rule. (Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246.) The critical determinations are whether the proceedings have ceased to be a general inquiry into an unsolved crime and begun to focus on the accused and whether the authorities have carried out a process of interrogation that lends itself to eliciting incriminating statements.
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> * * *
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> "If our adversary system had begun to operate at the time these conversations were recorded, if petitioner had, for all practical purposes already been charged with rape, his right to counsel matured. In Massiah v. United States, supra, 377 U.S. 201, 84 S.Ct. 1758, the other major premise for the Dorado decision, the accused was not in custody at the time the incriminating statements were made, but the proceedings had clearly become accusatory since Massiah made the statements after his indictment by a grand jury. Although custody may bear weightily on the issue of whether the accusatory stage has been reached it is clear from Massiah that where the accusatory stage is other-

> wise evident custody is not essential. At the very least Massiah demonstrates the interest being protected is not one which is only deserving of protection when the accused is in custody; i. e. the reason for the rule is not dependent on custody." (44 Cal. Rptr. at 295-296).

In a tax fraud case, there is even greater reason not to condition the taxpayer's right to counsel on custody, since, as in the present case, the Government typically gathers incriminating evidence from the taxpayer without taking him into custody.

Apparent Existence of a Crime. Finally, in holding that the investigation in the present case did not become accusatory, the court below attempted to distinguish *Escobedo v. Illinois, supra,* as follows:

> "The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. . . . In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed." (351 F. 2d at 901).

This analysis is deficient in several respects. First, it is by no means clear that "the existence of the crime was apparent" in *Escobedo.* The fact that police discover the corpse of a person fatally shot does not automatically mean that a murder has been committed, since other possibilities exist, *e.g.,* suicide or homicide in self-defense. More importantly, however, the court's reasoning again ignores a fundamental distinction between tax investigations and investigations for other types of crimes—in criminal tax investigations the "accused" is

known from the beginning and the "unknown" is whether a crime has been committed, while in other types of investigations police frequently have reason to believe that a crime has been committed and then proceed to determine who committed it. The relevance of this distinction to the accused's constitutional right to counsel has been succinctly set forth as follows:

> "Assume . . . that there are two variables in all criminal cases—a crime and a perpetrator. In the ordinary criminal case the unknown in the investigatory stage is the perpetrator, since there are reasonable grounds for thinking that a crime was committed. *Escobedo* seems to say that when there are reasonable grounds for thinking the identity of the perpetrator is no longer unknown there is a sixth amendment right to counsel. In an administrative crime like tax fraud, on the other hand, the grounds for thinking that a crime was committed may be less than in the ordinary criminal investigation and hence the crime might be regarded as the unknown. *If the investigators find a crime, they have simultaneously found the perpetrator. Thus, when an IRS agent has reasonable grounds for suspecting that a crime has been committed, an individual and a crime are in fact linked together just as they are when the ordinary criminal investigation has focused on someone. In both situations the individual needs counsel to inform him of the privilege against self-incrimination.*"[7] (Emphasis added)

As has been pointed out, *supra*, at least by the final meeting between Revenue Agent Stapley and petitioner

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[7]Krohnke, *supra* note 2, at 140-141.

in July, 1961, Stapley suspected petitioner of criminal income tax fraud and was investigating him with a view to eliciting incriminating statements and documentary evidence. Petitioner submits that at this point the investigation became accusatory within the meaning of *Escobedo v. Illinois*. To postpone the duty of Internal Revenue Agents to warn the taxpayer of his right to counsel until the crime has become "apparent" (whatever that means), would be to render the "right" wholly illusory in a criminal tax investigation.

To summarize: The court below has erroneously and mechanically applied the *Escobedo* doctrine, without any consideration of the realities of a criminal tax investigation. The court's decision presently is the law of the land, and, if allowed to stand, will utterly vitiate the taxpayer's right to counsel under the Sixth Amendment in criminal tax cases.

II.

The Issue Involved Herein Deserves Early Attention by This Court in View of the Enormous Practical Importance of Assuring Administration of the Criminal Tax Laws According to Constitutional Standards.

The constitutional issue involved in this case is of the utmost practical, as well as theoretical, importance. The Internal Revenue Service has one of the most ubiquitous and active investigatory arms of any federal agency, and virtually every citizen of the United States is a potential subject of an IRS tax investigation.[8]

[8]See Miller, "Administrative Agency Intelligence-Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service, 6 B.C. Ind. & Com. L. Rev. 657, 664-666 (1965); Rogge, "Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations," 47 Minn. L. Rev.

Even more important, the IRS seeks to invoke criminal sanctions more often than any federal agency other than the FBI.[9] Since the early 1950's there has been a great increase in criminal tax fraud cases, due mainly to a fundamental change in enforcement policy by the IRS and the Department of Justice, authorizing prosecutions where the Government's evidence of guilt is less than clearcut.[10] Since 1958 the IRS has had approximately 1,000 criminal income tax cases per year.[11] These facts indicate the great importance of assuring that the IRS conducts its many criminal investigations according to constitutional standards, including, of course, the Sixth Amendment right to counsel.

Petitioner contends that the decision of the court below, presently unchallenged by any Court of Appeals decision, in effect authorizes the IRS to deprive taxpayers subject to criminal investigation of their right to counsel under the Sixth Amendment. Even *before* this case was decided, however, the IRS had adopted the position that *Escobedo v. Illinois* does not require that taxpayers be warned of their rights to counsel or to remain silent *at any stage during a tax investigation.*[12]

939, 964 (1963) ("The agency that has the oldest investigative subpoena powers, the most varied as well as the most severe enforcement procedures, and probably has issued the greatest number of such subpoenas is the Internal Revenue Service.") *Application of House,* 144 F. Supp. 95, 103 (N.D. Cal. 1956) ("The field of taxation represents probably the greatest single area of contact between individuals and the force of the state.")

[9]Krohnke, *supra* note 2, at 135, n. 7; it is highly significant that the FBI, for many years, has instructed its agents to inform a suspect of his rights to counsel and to remain silent at the outset of each interrogation. J. Edgar Hoover, "Civil Liberties and Law Enforcement," 37 Iowa L. Rev. 175, 182 (1952).

[10]See Avakian, *supra* note 5, at 878; Heckerling, *supra* note 4, at 807-808.

[11]Krohnke, *supra* note 2, at 135, n. 7.

[12]Krohnke, *supra* note 2, at 135, n. 7.

The decision of the court below is entirely consistent with this erroneous interpretation of *Escobedo v. Illinois* as applied in criminal tax cases. The court's decision can do nothing but reinforce the present practice of criminal tax investigators not to inform taxpayers of their rights to counsel or to keep silent, even after the investigation has become accusatory and Government agents are attempting to elicit incriminating evidence from the taxpayer. These facts militate for a consideration by this Court of the issue involved herein at the earliest possible time. So long as the decision of the court below is allowed to stand, literally thousands of taxpayers will continue to be deprived of fundamental constitutional rights.

III.

The Decision Below Is in Clear Conflict With at Least One Other Federal Court Case Involving the Escobedo Doctrine as Applied in Criminal Tax Cases.

Due primarily to the short period of time since *Escobedo v. Illinois, supra,* was decided, there is a dearth of authority on the issue involved herein. As the court below stated, "Counsel have not cited, nor have we found, any cases applying either Massiah or Escobedo in a case involving an income tax investigation." (351 F. 2d at 901). Since the present case was argued, however, at least one District Court case has been decided which sharply conflicts with the decision of the court below. *United States v. Gower,* 16 Am. Fed. Tax R. 2d 5714, ... F. Supp. .... (N.D. Pa. 1965), involved a prosecution for failure to file Retail Dealer's Excise Tax Returns. The taxpayer was investigated by a Revenue Agent and a Special Agent, who allegedly obtained certain documents from the taxpayer. In addition, the

IRS agents recorded and transcribed their interrogation of the taxpayer. The taxpayer moved to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure. In connection with this motion, taxpayer moved for the production of certain documents, contending that he needed to inspect these documents in order to prepare for the hearing on his motion to suppress, at which he intended to show that the investigation had become accusatory and that IRS agents had obtained documentary evidence and statements from him without warning him of his rights to counsel or to remain silent, thereby depriving him of these rights. The District Court, in a written opinion, held that the taxpayer was entitled to inspect documents in the possession of the Government in preparation for the hearing on his motion to suppress. In arriving at this conclusion, the court stated:

> "Therefore, the question arises, is it necessary that the Government be required to produce the items subpoenaed for inspection by the defendant in order to properly determine the issues raised herein? In these days of Constitutional turmoil concerning the rights and privileges of an accused person as guaranteed by the United States Constitution, *it should be obvious that a taxpayer charged with violating the Internal Revenue Code is entitled to the same Constitutional protection as a person charged with committing a crime of violence. In that regard also, when agents of the Internal Revenue Service seek out evidence of a violation of the tax laws with a view toward a criminal prosecution, they occupy the same position as a policeman or detective who is ferreting out crimes on a wider scale and, usually, of a different nature.*" (16 Am. Fed. Tax. R. 2d at 5716-5717; emphasis added.)

This passage from the court's opinion is in clear conflict with the decision of the court below. Although *Gower* is a District Court decision, petitioner submits that it creates a potential conflict between the Ninth and Third Circuits as to the effect of *Escobedo v. Illinois* in a criminal tax investigation and emphasizes the importance of an early resolution of this crucial constitutional issue.

Conclusion.

For the foregoing reasons, petitioner respectfully urges this Court to grant this petition for a writ of certiorari.

January 27, 1966.

Respectfully submitted,

LAUGHLIN E. WATERS,
THOMAS L. CAPS,
RICHARD R. MAINLAND,
Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RECEIVED
OCT 27 1965
Noesaman, Waters, Scott, Krueger & Riordan

GEORGE KOHATSU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 19,738

[October 22, 1965]

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: CHAMBERS and DUNIWAY, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

This is an appeal from a judgment of conviction on four counts of a six count indictment. Counts One, Three and Five charged a violation of 26 U.S.C. 7201 (willful attempt to evade or defeat income tax) for the years 1957, 1958, and 1959 respectively. Counts Two, Four and Six charged a violation of 26 U.S.C. 7206(1) (willful falsification of income tax return under penalty of perjury) for the same years. Appellant was acquitted on Counts One and Two involving the year 1957 and convicted on the remaining counts involving the years 1958 and 1959.

Appellant was a member of a partnership engaged in farming and related enterprises, including the operation of a farm labor camp. In 1958 and 1959 the partnership also constructed a trailer park. Appellant was actively engaged in the managment of the partnership and maintained and prepared its financial records. His income was his distributive share of the partnership income.

It is undisputed that there was unreported income for the three taxable years, and that for 1957 and 1958 the amounts were sub-

stantial. The unreported income consisted of receipts from the sale of farm produce and from the farm labor camp operations, and excess depreciation on the trailer park in 1959. As counsel for the appellant state in their opening brief, the crucial issue was whether appellant's understatements of income were willful.

Appellant sets forth six specifications of error, two of which raise constitutional questions: (1) that evidence was admitted which had been obtained in violation of appellant's right to counsel under the Sixth Amendment,[1] in that appellant was deprived of counsel after the investigation had reached the "accusatory stage"; and (2) that evidence was admitted in violation of the Fourth[2] and Fifth Amendments,[3] in that investigative agents of the Internal Revenue Service failed to warn or advise appellant of his constitutional rights and privileges.

The investigation was commenced in June, 1960, when appellant's income tax return for 1958 was assigned to a revenue agent for audit. For approximately one year periodic meetings were held between appellant and the agent, Valgene T. Stapley. During this period appellant turned over to Stapley numerous bookkeeping records and related materials.

On June 23, 1961, Stapley informed appellant that bank deposit records showed deposits in excess of income reported in appellant's 1958 tax return. At a meeting on July 17, 1961, appellant misrepresented to Stapley a cash payment alleged to have been made to the contractor for the construction of the trailer park.

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[1]The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

[2]The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

[3]The Fifth Amendment provides in part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty or property, without due process of law; . . ."

At a meeting on July 27, 28 or 29, Stapley again told appellant that the receipts shown on the 1958 income tax return did not agree with the bank deposits. Appellant then informed Stapley that $40,500 in cash had been taken from a safe deposit box and deposited in one of the partnership accounts. This statement was reduced to writing and signed by appellant. It was admitted into evidence without objection. In his testimony at the trial appellant admitted that he did not have any cash in a safe deposit box.

In early August, 1961, the investigation was referred to Special Agent Charles Vitello of the Intelligence Division of the Internal Revenue Service. Stapley accompanied Vitello to a meeting with appellant on September 14, 1961, when Vitello presented his "credentials", which were examined by appellant. Vitello conducted a further investigation during September and October, meeting with appellant on September 14 and 20 and October 31. At these meetings he secured additional documents from appellant.

In late 1961, Vitello turned the investigation and various documents over to Special Agent John Lines. Lines continued the investigation, without meeting with appellant until May 10, 1963. On that day appellant had a "question and answer conference" with Special Agent Lines, which was also attended by another agent and a reporter of the Internal Revenue Service. Lines testified that he advised appellant "as to his constitutional rights" and told him that he did not have to "say anything or offer any document which might tend to incriminate him under any of the federal laws", and that "Mr. Kohatsu said that he understood". Appellant, however, testified that he first learned that he was being investigated with the possibility of criminal prosecution in August, 1963.

Conceding that an internal revenue agent has a right to determine a taxpayer's correct civil liability and in so doing to interrogate the taxpayer and examine his books and records, appellant contends that this "routine civil tax investigation" undergoes a fundamental change when (1) a revenue agent discovers facts indicating substantial unreported income, and (2) the facts are such that the revenue agent suspects fraud. It is appellant's position that when these events occur, the investigation "has begun to focus on a particular suspect" and that from that point "government agents have a duty to inform the taxpayer of his

right to counsel, and that they must not elicit further incriminating evidence from the taxpayer until he has been informed of his constitutional rights in specific, understandable terms".

Appellant argues that the investigation "focused on appellant" not later than July 28, 1961, and certainly not later than early August, 1961, when Revenue Agent Stapley referred the investigation to Special Agent Vitello of the Intelligence Division. It is contended that thereafter the agents were no longer "merely attempting to determine appellant's correct tax liability", but rather were "attempting to elicit incriminating statements and documentary evidence from appellant for possible use in a subsequent criminal prosecution".

It is the Government's position that it was Stapley's duty as a revenue agent to audit appellant's returns to determine the correct tax liability for civil purposes, and that it was Vitello's duty as a special agent of the Intelligence Division to investigate alleged violations of matters relating to income tax and make a recommendation based upon his investigation. The Government contends that both agents were engaged in investigative activities, and that the accusatorial stage had not been reached during any of their investigation.

In support of his contention that his constitutional rights were violated, appellant relies primarily upon Massiah v. United States, 1964, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246, and Escobedo v. Illinois, 1964, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977.[4] Counsel have not cited, nor have we found, any cases applying either Massiah or Escobedo in a case involving an income tax investigation. It is necessary accordingly to consider rather

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[4]No objection was interposed on either constitutional ground at the trial. Appellant contends, however, that these errors may properly be considered by this court as "plain errors • • • affecting substantial rights" under Rule 52(b) F.R.Cr.P., particularly in view of the fact that Escobedo v. Illinois was decided subsequent to appellant's conviction. If appellant's constitutional rights were in fact violated, this would be true. See United States v. Atkinson, 1936, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555; Morris v. United States, 9 Cir. 1946, 156 F.2d 525; Billeci v. United States, 9 Cir. 1961, 290 F.2d 628; Dickey v. United States, 9 Cir. 1964, 332 F.2d 773.

precisely what was held in both cases and their impact upon a case of this nature.

In Massiah the defendant, under indictment for violation of the narcotic laws, had retained counsel and was free on bail when, out of the presence of his attorney, he made incriminating statements to a co-defendant, who, without Massiah's knowledge, had agreed to become a witness for the Government. The statements were overheard by federal agents who had installed radio equipment in the co-defendant's car. The court, in referring to the guarantee of the Sixth Amendment, said:

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." (377 U.S. at 206).

In Escobedo the defendant made incriminating statements during a period of police interrogation after he was arrested and after his request to see his attorney had been denied. In reversing his conviction, the Court said:

In Escobedo the defendant made incriminating statements during a period of police interrogation after he was arrested and after his request to see his attorney had been denied. In reversing his conviction, the Court said:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (378 U.S. at 490).

In taking the phrase "focus on a particular suspect" out of context, appellant would extend the rule of Escobedo beyond any logical implication of the effect of that decision. The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested.

A comparable situation was considered by this court in Irwin v. United States, 1964, 338 F.2d 770, 777, where the defendant, convicted of mail fraud, claimed his right to counsel had been violated when a postal inspector submitted an inquiry to the defendant's company and received from the company material connected with the fraudulent scheme. In holding that the evidence of the postal inspector was properly admitted, we said:

> "At that time neither [of the defendants] had been indicted or arrested. The postal inspector was conducting an investigation to determine if appellants were engaging in an unlawful activity. The accusatorial stage of the proceeding had not yet been reached. This being true, the eliciting of the evidence described without revealing to appellants the identity of the investigator or advising them of their right to counsel, and without appellants then having the aid of counsel, was not violative of their rights under the Sixth Amendment, as construed and applied in Escobedo or Massiah or any other Supreme Court decision. Nor were they thereby denied any rights under the Fourth and Fifth Amendments, invoked in appellant's supplemental brief."

The same reasoning applies here with respect to appellant's claim of violation of constitutional rights under both the Sixth Amendment and the Fourth and Fifth Amendments.

Appellant recognizes that under "existing authorities" the "facts do not show sufficient affirmative fraud on the part of the Government agents" to render inadmissible the testimony of the agents and the documents and records they obtained from appellant. He argues, however, that under the "philosophy" of Escobedo, government agents must be "held to the duty, dating from the time they suspect the taxpayer of fraud, of informing him of

the criminal nature of the investigation and his absolute constitutional right to remain silent under the Fifth Amendment".

We find nothing in the Escobedo opinion or its "philosophy" which would impose this duty upon revenue agents during their investigation of a taxpayer's tax returns and records. It is clear that all statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation. As the court well said in United States v. Sclafani, 2 Cir. 1959, 265 F.2d 408, 414-15, cert. den. 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534:

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.
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> "Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose."[5]

All of the agents properly identified themselves to appellant and disclosed their purpose to audit his returns. Appellant was fully apprised of the Government's concern with the accuracy of his returns. We find no violation of any of his constitutional rights.

Appellant contends that the trial court erred in excluding expert testimony of an accountant regarding appellant's bookkeeping errors. The errors are conceded, but it is argued that the testimony should have been received in support of appellant's defense that his "understatements of income" resulted from his carelessness and lack of competence as a bookkeeper and not from a willful attempt to evade his income tax.

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[5]See also Hanson v. United States, 8 Cir. 1950, 186 F.2d 61; Legatos v. United States, 9 Cir. 1955, 222 F.2d 678; Greene v. United States, 2 Cir. 1961, 296 F.2d 841, vacated and remanded on other grounds, 369 U.S. 403, 82 S.Ct. 852, 7 L.Ed.2d 841.

The appellant used the so-called "Ideal System", a simple type of bookkeeping showing entries in "income received" and "expenses paid" columns. Appellant testified regarding the manner of keeping his books and the methods and procedures followed. He was interrogated on both direct and cross-examination regarding specific entries and his failure to make various entries. Government witnesses were also cross-examined with respect to mathematical errors in appellant's bookkeeping records. Some of these errors were against the taxpayer and some were against the Government. It is apparent from all of this testimony that appellant made many mathematical errors in his computations and that he did not make his entries on a regular systematic basis.

Appellant argues that the expert accountant who had made a thorough analysis of appellant's books and records should have been permitted to testify to "his observations concerning the manner in which appellant kept his 'Ideal System' ".[6] In his reply brief appellant argues that he was attempting to show by expert testimony *facts* (not opinion) "that appellant made

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[6]The purpose of the testimony is set forth in the following colloquy:

"MR. CAPS: Would you hand the witness Exhibit Z, please, the Ideal book.

(Document handed to the witness.)

"BY MR. CAPS:

Q During your audit and review of the books and records of George Kohatsu, did you have occasion to familiarize yourself with Exhibit Z in front of you?

A I certainly did.

Q What did you find regarding the manner in which that record was kept?

A There are many instances——

MRS. DUNNE: Your Honor, I am very sorry to renew this objection, but I do not see any relevancy for telling the manner in which this record is kept. The issue is what income was reported or not reported, and what tax liabilities there are.

THE COURT: The objection is sustained.

MR. CAPS: There is no issue with respect to the amount of income that was reported; the only issue in this case is the reason for the omission, and I submit that in this respect that the bookkeeping records and the manner in which they were kept is of vital importance to the defendant.

THE COURT: The objection is sustained."

numerous mistakes in keeping his books, from which the jury could infer a lack of willfulness."[7]

As noted supra, there was substantial evidence in this case that errors were in fact made. No expert testimony was necessary to show these *facts*. There was also substantial testimony from the appellant himself as to the *manner* in which he kept his books. It was for the jury to determine whether the errors and the failure to report income resulted solely from bookkeeping carelessness or from a willful attempt to evade income tax. The accountant's opinion or conclusion that the errors resulted from appellant's carelessness, without intent to evade his income tax, would have been improper as going beyond the scope of his expert competence.[8] Viewing the evidence as a whole, we conclude that there was no prejudicial error in excluding the accountant's testimony.

Appellant next argues that the trial court erroneously excluded testimony of the appellant and another witness offered to show that appellant cooperated with Government agents during the investigation. He relies primarily upon the cases of United States v. Matot, 2 Cir. 1944, 146 F.2d 197, and Heindel v. United States, 6 Cir. 1945, 150 F.2d 493. Both cases are distinguishable for the reasons set out in Hayes v. United States, 10 Cir. 1955, 227 F.2d 540, 543,[9] where the court said:

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[7]Appellant relies upon a number of civil tax cases holding that it is proper to consider the taxpayer's carelessness and ineptitude in keeping books in determining the issue of willfulness. It was proper for the jury to consider the numerous errors in bookkeeping in determining the issue of willfulness in this case. While the court's instructions on this point are not a part of the record, no exceptions were taken to the instructions, and presumably the jury was properly instructed with respect to the issue of willfulness.

[8]It is of course recognized that an expert accountant may properly summarize voluminous records and interpret and explain certain evidence within the province of his expert competence. Cf. United States v. Willis, 3 Cir. 1963, 322 F.2d 548, and cases there cited. See also Bostwick v. United States, 5 Cir. 1955, 218 F.2d 790; Blumberg v. United States, 5 Cir. 1955, 222 F.2d 496.

[9]In distinguishing Matot and Heindel the court noted that in both cases the defendant had made a prompt effort to rectify the situation as soon as his wrongdoing was brought to light, whereas in Hayes the defendants made no effort to pay the tax until some years after the alleged fraud was brought to their attention. In the instant case

> "When acts of subsequent conduct are offered to prove absence of evil intent, the trial court is vested with considerable discretion in admitting or refusing to admit such evidence. At best, the offer to pay after the defalcation or fraud has been established has but small probative value for the purpose of showing lack of evil intent. The trial court must consider the circumstances surrounding the offer and its exclusion of such evidence does not constitute reversible error, unless under all the circumstances of the case it clearly should have been admitted."[10]

After reviewing the evidence in this case, including the testimony of the Government witnesses relative to their interviews with appellant, we conclude that appellant was not prejudiced by the exclusion of the offered testimony regarding his cooperation in the investigation.

Appellant next claims prejudicial error in comments of the trial court indicating (1) bad faith on the part of appellant's counsel, and (2) lack of probative force in appellant's evidence. Appellant specified three alleged improper comments of the court. No objection was taken to two of the comments.

From our examination of the record as a whole, including the comments specified by appellant, we find no prejudicial error.[11]

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the excluded testimony related to events occurring long after the Government began its investigation and at a time when the defendant knew his returns were being audited.

[10]See also Bateman v. United States, 9 Cir. 1954, 212 F.2d 61, 68, where this court in a tax fraud case held that the trial court had properly excluded evidence that the taxpayers had filed petitions in the Tax Court protesting the assessment of tax deficiencies, on the ground that the offered evidence had "no probative value in establishing appellants' state of mind at the time of the alleged criminal act * * *". We said further: "Furthermore, the acts appellants rely upon to show good faith in 1946 and 1947 occurred in 1950, long after the Government had commenced its investigation and at a time appellants knew their returns were being audited." (212 F.2d at 69).

[11]As this court said in Bush v. United States, 9 Cir. 1959, 267 F.2d 483, 488: "Merely because a statement is made or question asked by court or counsel in the heat of a spirited trial which subsequently in the cool ivory tower of appellate court chambers seems inappropriate does not make the stating nor the asking prejudicial error." See also Todorow v. United States, 9 Cir. 1949, 173 F.2d 439.

The remarks did not convey to the jury any impression of the trial judge's personal feelings as to the guilt or innocence of appellant or impugn the integrity of either counsel. Moreover, at the close of the evidence, the court admonished the jury to disregard any comment which might indicate his opinion regarding the case.[12]

Finally, appellant contends that the trial court erroneously restricted appellant's cross-examination of certain Government witnesses. It is well settled that the extent of cross-examination rests in the sound discretion of the trial judge.[13] From our examination of the record we are satisfied there was no abuse of that discretion.

Finding no prejudicial error, we affirm.

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[12]The court said:

"You are instructed that if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion. I have not expressed, nor intended to express, nor have I intimated or intended to intimate, any opinion as to what witnesses are, or are not worthy of belief, what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it."

[13]See Beck v. United States, 9 Cir. 1962, 298 F.2d 622, 629; Enriquez v. United States, 9 Cir. 1961, 293 F.2d 788, 794; Robles v. United States, 9 Cir. 1960, 279 F.2d 401, 405, and cases there cited.

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APPENDIX B.

Statutes Involved.

26 U.S.C. §7201 (68A Stat. 851) provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. §7206(1) (68A Stat. 852) provides:

"Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

* * *

. . . shall be guilty of a felony, and upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 965

GEORGE KOHATSU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 351 F. 2d 898.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1965 (1 V. 68).[1] A timely petition for rehearing was denied on December 2, 1965. On December 30, 1965, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 31, 1966. The petition was filed on January 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Record references are to the five-volume record on file with the Clerk of this Court.

219-916—66

QUESTION PRESENTED

Whether records furnished by petitioner and statements made by him to Internal Revenue Service agents investigating his income-tax returns were obtained by the agents in violation of petitioner's Sixth Amendment rights.

STATEMENT

After a trial by jury (1 V. 32) petitioner was convicted on four counts of a six-count indictment charging him with executing false partnership information returns and attempting to evade his own income taxes for 1957 and 1958 (1 V. 1–6) in violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954. He was sentenced to concurrent one-year terms of imprisonment on each of the counts and to pay a $10,000 fine on one count (1 V. 33).

Petitioner kept the books and prepared the tax returns for a partnership of which he was a member (3 V. 355). According to government computations presented at his trial, petitioner understated the partnership net income by a total of $73,411.30 in 1957, 1958 and 1959 (3 V. 420–421), and he understated his own taxable income in these years by $29,338.29 and his personal taxes by $11,119.88 (3 V. 433–435). Certain farm produce sales and farm labor camp income was omitted, and excessive depreciation was taken on a trailer park owned by the partnership as a result of petitioner's overstatement of the invested costs.

The evidence relevant to the constitutional claim made here by petitioner is as follows: By a letter to petitioner mailed June 27, 1960, and by subsequent

phone calls, Internal Revenue Agent Stapley initiated a series of interviews with petitioner between July 1960 and late summer of 1963 (2 V. 105, 107, 373). At the outset, Agent Stapley informed petitioner that his 1958 tax return was under examination (2 V. 106). Over a period of time, petitioner gave Stapley cancelled checks (2 V. 117, 128), books of original entry (2 V. 109), and two contracts which, he asserted, established the cost basis of the trailer park (2 V. 132). The contract prices totalled $260,771, but the cancelled checks showed that the cost basis of the park was $201,575.63 (3 V. 417). Petitioner told Stapley that discrepancies between partnership bank deposits and reported gross receipts were due to the transfer of $40,500 from a safety deposit box to the bank account (2 V. 130), and that the trailer park construction cost included $60,000 paid in cash to the contractor (2 V. 127). Both these statements were proved untrue at the trial (2 V. 215–H, 4 V. 714).

In early August 1961, Stapley referred the matter to the Intelligence Division (2 V. 199). On September 14, 1961, Stapley came to petitioner's home with Special Agent Vitello, whose duties were to investigate and make recommendations on income-tax violations (3 V. 306). Vitello showed his credentials to petitioner on this occasion (3 V. 307). Thereafter, petitioner supplied Vitello with various checks, invoices and other records and orally repeated his claim that he had made payments to the trailer park contractor (3 V. 309).

Vitello thereafter transferred his assignment to Special Agent Lines, who worked from the records

and documents given him by Vitello (3 V. 351–352). Lines interviewed petitioner on May 10, 1963 (3 V. 352). He informed petitioner at that time that the investigation was to determine whether there had been a violation of the internal revenue laws (3 V. 375). Lines also read to petitioner a statement advising him that he was under no legal duty to speak and that he could exercise the privilege against self-incrimination (3 V. 353, 376). Much of the evidence introduced at petitioner's trial had been obtained in the course of Stapley's and Vitello's investigations. Petitioner was not given any warning by either of these agents.

ARGUMENT

There is no merit to petitioner's contention that he became constitutionally entitled to the assistance of counsel at the time when Agent Stapley's investigation became "accusatory." The fact that the agent may have "strongly suspected" (Pet. 14) that petitioner had committed one or more criminal offenses did not change his investigation into a "criminal prosecution" in which petitioner was entitled to "have the Assistance of Counsel for his defence" within the meaning of the Sixth Amendment.

This case is plainly distinguishable from *Escobedo* v. *Illinois*, 378 U.S. 478, because the circumstances under which the challenged statements were made were totally different in *Escobedo* than they were here. The accused in *Escobedo* was in custody and had asked to be permitted to consult with his attorney. As we point out in our brief in *Westover* v. *United States*, No. 761, this Term, pp. 34–35, 42 (which we are serv-

ing on petitioner), the police conduct in *Escobedo* was such as to undermine the free choice guaranteed by the constitutional privilege against self-incrimination. In the present case, petitioner was under no coercive influences whatever. He was able freely to determine, after opportunities for consultation with anyone to whom he wished to speak, whether or not to make statements and to produce documents. His decision to cooperate with the agents was voluntary, and there was no constitutional obligation upon the agents to supply him with an attorney or to advise him of his right to retain one even if they had reason to believe him guilty of a criminal offense.

The Court may, of course, deem it appropriate to defer decision on this petition until the decision of cases now under advisement involving related issues.[2] We believe, however, that irrespective of the outcome of those cases, the constitutional claim is unsound when, as was true in this case, the suspect was not in custody or under any other coercive influence at the time he made his incriminating disclosures. Even if the Court were to hold in the cases now under advisement that a "criminal prosecution" in the Sixth Amendment sense begins with arrest, that determination would not render the Sixth Amendment right applicable to the pre-arrest and preindictment stage involved in this case. Courts of appeals

[2] *California* v. *Stewart*, No. 584; *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; *Westover* v. *United States*, No. 761; *Johnson and Cassidy* v. *New Jersey*, No. 762.

have so held since *Escobedo* v. *Illinois, supra.*[3] Prior to that decision and thereafter it has consistently been held that voluntary statements made to tax investigators were not inadmissible on account of a failure to warn the taxpayer of his right to be silent or to notify him that he could consult an attorney. *Scanlon* v. *United States,* 223 F. 2d 382, 384–385 (C.A. 1); *Greene* v. *United States,* 296 F. 2d 841, 842–843 (C.A. 2), vacated and remanded on other grounds, 369 U.S. 403; *United States* v. *Burdick,* 214 F. 2d 768, 773–774 (C.A. 3), vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932; *United States* v. *Spomar,* 339 F. 2d 941, 943 (C.A. 7), certiorari denied, 380 U.S. 975; *Hanson* v. *United States,* 186 F. 2d 61, 64–66 (C.A. 8).[4]

Finally, we note that petitioner neither moved to suppress the challenged evidence in the district court nor did he object to its admission on the grounds now asserted. Consequently, the facts were not developed at trial, and there is no way of knowing from this

[3] See *Stanfield* v. *United States,* 345 F. 2d 523, 524 (C.A. 10); *Irwin* v. *United States,* 338 F. 2d 770, 777 (C.A. 9), certiorari denied, 381 U.S. 911.

[4] *Gower* v. *United States,* 16 A.F.T.R. 2d 5714, decided August 27, 1965 (M.D. Pa.), on which petitioner relies (Pet. 26–28), is inapposite. That case concerned a taxpayer's right to inspect documents which were in the custody of the Internal Revenue Service. The court's statement that those suspected of violating the tax laws are entitled to the same protections as other criminal defendants does not conflict with the result reached here. Our position is that any criminal defendant in petitioner's position—*i.e.,* being interviewed with regard to a possible crime while he is at liberty and before formalized proceedings have been instituted—is not within the Sixth Amendment's guarantee of assistance of counsel.

record whether or not petitioner did, in fact, consult an attorney while Agent Stapley's investigation was being conducted. The mere fact that he was not told that he could seek the advice of counsel and have an attorney present during his meetings with the agent should obviously not render his statements and other evidence inadmissible if, in fact, he acted on the advice of counsel or, knowing that he could retain an attorney, voluntarily chose to proceed on his own.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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IN THE

Supreme Court of the United States

October Term, 1965
No. 965

GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Appendix B. Letter from Mitchell Rogovin to Mr. Duane W. Krohnke, dated May 27, 1965.

TABLE OF AUTHORITIES CITED

Cases

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IN THE

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October Term, 1965
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GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully submits this reply brief in support of his petition for a writ of certiorari herein.

Argument.

Initially, it should be noted that the brief of the United States in opposition to the petition for a writ of certiorari herein does not deny the great theoretical and practical importance of the question raised by petitioner—the applicability of *Escobedo v. Illinois,* 374 U.S. 378 (1964), in criminal tax fraud investigations. The brief of the United States is devoted exclusively to the argument that petitioner's constitutional claim is unmeritorious. Petitioner respectfully submits that the importance of this constitutional claim warrants the granting of his petition, after which the "merits" of the claim may be argued more thoroughly by both petitioner and the United States.

As to the substance of the United States' argument, it contains the same essential defect as the opinion of the court below in this case—a failure to apply the *Escobedo* doctrine realistically in light of the special nature of criminal tax investigations. The United States appears to have taken the position, as did the court below, that *Escobedo* is "plainly distinguishable" from this case because petitioner had not been arrested, taken into custody or indicted when he made incriminating statements and produced incriminating documents.[1] (U.S. Br. pp. 4-5.) Although asserting the need for arrest, custody or indictment in order for the right to counsel to attach in a criminal tax investigation, the brief of the United States is utterly devoid of *reasons* why these factors should be deemed of constitutional significance. Petitioner, on the other hand, has attempted to demonstrate that these artificial requirements, whatever their applicability as to other types of crime, would leave the *taxpayer* subject to criminal investigation without an effective right to counsel at the stage of the proceeding when the aid of counsel is most critical to him. (See Pet. pp. 15-24.)

It is important to note that this failure to work out a reasonable interpretation of *Escobedo* as applied in criminal tax cases is reflected in the position taken by the Internal Revenue Service, as stated in letters from its Chief Counsel to the author of a recent law review

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[1]The United States also purports to distinguish *Escobedo* on the ground that the police in that case denied defendant's request to consult with his attorney. (U.S. Br., p. 4) While petitioner emphatically denies the need for such a request, he is informed that this issue has been thoroughly argued in cases presently before this Court (*e.g., Vignera v. New York*, No. 760) and therefore will not argue the point in this brief.

Comment.[2] The position of the Service contained in these letters is that investigating agents have *no duty* to warn a taxpayer of his right to counsel *at any stage of a criminal tax investigation,* although, as a matter of "administrative desirability" it is "the general practice of the Intelligence Division that a taxpayer be advised in criminal income tax cases of his right to counsel when offered the opportunity to attend an interview with officials of that Division *at the conclusion of the investigation.*"[3] Appendix B p. 3; (Emphasis added.) As to the effect of *Massiah v. United States,* 377 U.S. 201 (1964); and *Escobedo* on the investigative practices of the Internal Revenue Service, its Chief Counsel frankly stated that "we do not believe that the decisions are applicable in the income tax area," and Accordingly, our procedures have not been changed. . . ." (Appendix A p. 8.)

The position of the IRS that *Escobedo* is not "applicable in the income tax area" is nothing less than an abdication of the Service's duty to follow the decisions of this Court as they apply to matters within the Service's jurisdiction. The IRS has arbitrarily seized upon certain factual differences, *e.g.,* the defendant in *Escobedo* was in custody while normally the taxpayer subject to criminal investigation is not, and has purported

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[2]Krohnke, The Constitutional Right to Counsel in Tax Investigations, 33 U. Chi. L. Rev. 134 (1965). Copies of these letters are attached hereto as Appendices A and B, respectively.

[3]In the present case there is no evidence that petitioner was advised of his right to counsel at any stage of the investigation, although petitioner was advised of his privilege against self-incrimination at such an "interview" with Special Agent Lines "at the conclusion of the investigation," *after* goverment investigators had obtained from petitioner virtually all of the incriminating evidence necessary to convict him.

to "distinguish" *Escobedo* from the typical criminal tax case. The significant facts, ignored by the IRS, are that agents of the I.R.S., upon suspecting a taxpayer of fraud, systematically attempt to elicit incriminating evidence from him with a view to a subsequent criminal prosecution without warning the taxpayer of his rights to counsel or to keep silent. Such a taxpayer is the "accused" to the same extent as the defendant in *Escobedo,* and the absence of custody, arrest and indictment is wholly irrelevant to his critical need for counsel during the accusatory stage of the investigation. By allowing the IRS to conduct such investigations without a warning of the rights to counsel and to keep silent, this Court would be placing its judicial imprimatur upon a system whereby the criminal tax fraud trial is indeed "no more than an appeal from the interrogation." (378 U.S. at 487.)

In addition to the supposed "prerequisites" of arrest, custody or indictment discussed above, the United States asserts an additional reason for holding *Escobedo* inapplicable in the present case, namely, that there were no "coercive influences" exercised on petitioner so as to "undermine the free choice guaranteed by the constitutional privilege against self-incrimination." (U.S. Br. p. 5.) The argument seems to be that, despite the plain language of the Court's opinion, *Escobedo* was not really a Sixth Amendment case, and that the true basis of the decision lies in the Fifth Amendment privilege against self-incrimination. From these premises, the Government contends that the warning of the right to counsel is merely a "factor" to be considered in determining whether the defendant's incriminating statements were "voluntarily" made. (See U.S. Br. in *West-*

over v. United States, No. 761, served on petitioner herein.) Petitioner submits that this position cannot be reconciled with the opinion of this Court in *Escobedo.* The Court in that case made no finding that the incriminating statements had been coerced or involuntarily made by the defendant. In fact, the Court did not question the specific holding of the Supreme Court of Illinois that there was "no reason for disturbing the trial court's finding that the confession was voluntary." 28 Ill. 2d 41, 45, 46 (1964). Further, this Court expressly based its decision on the Sixth, not the Fifth, Amendment. (378 U.S. at 491.) The need for protecting criminal defendants from involuntary self-incrimination is admittedly great, and the Fifth Amendment provides that protection. The rationale of *Escobedo,* however, was not to protect the accused from "coercion", but rather was to provide the accused with the advice of counsel at the stage of the proceedings when he is most apt to incriminate himself, so that he may proceed with full ***knowledge*** of his Constitutional rights and privileges. As the Court pointed out in *Escobedo,*

> ". . . no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (378 U.S. at 490.)

Finally, the United States raises the possibility that petitioner may have had the aid of counsel during the investigation herein. (U.S. Br. pp. 6-7.) First, it should be noted that this is the first stage of this entire proceeding at which a representative of the United States has suggested this possibility. There is no testimony in the record indicating that counsel was present at any of the meetings between petitioner and investigating agents, or that petitioner was ever advised by counsel during the investigation. Moreover, the burden is not on petitioner to show that he was not represented by counsel during the investigation. As the California Supreme Court has properly stated, "The prosecution has the burden of showing that the suspect, once the investigation has reached the accusatory stage, was informed of his constitutional rights to counsel and to remain silent at that stage, or that he knowingly and intelligently waived those rights. Waiver cannot be presumed from a silent record . . . the record before us is barren of any evidence that the authorities either informed defendant of his rights or that he waived them." *People v. Furnish*, 63 Adv. Cal. 536, 541 (1965).

Conclusion.

For the foregoing reasons, petitioner respectfully urges this Court to grant his petition for writ of certiorari herein.

Respectfully submitted,

LAUGHLIN E. WATERS,
THOMAS L. CAPS,
RICHARD R. MAINLAND,
Counsel for Petitioner.

APPENDIX A

U.S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

WASHINGTON, D.C. 20224

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MAY 6 1965

Mr. Duane W. Krohnke
Office of the Editor
The University of Chicago Law Review
Chicago 37, Illinois

In re: Application of Massiah and Escobedo to Income Tax Investigations

Dear Mr. Krohnke:

This is in further regard to your letters of March 29, 1965 to Mr. G. d'Andelot Belin, General Counsel of the Treasury Department, and Mr. Arnold Sagalyn, Director, Office of Law Enforcement Coordination, regarding the Massiah and Escobedo cases. Specifically, you inquire as to their effect on the investigative techniques of law enforcement agencies of the Treasury Department. Our remarks are limited to the manner in which the cases in question affect the investigative activities of the Internal Revenue Service in the income tax area.

In Massiah v. United States, 377 U.S. 201 (1964), incriminating statements made by the petitioner and picked up on a hidden radio were deemed inadmissible as evidence. The Court relied on the Sixth Amendment guarantee of right to counsel and did not reach the question of petitioner's Fourth Amendment rights.

Petitioner was free on bail after being indicted for violation of the narcotics law. The incriminating statements were made in the

automobile of a confederate who, unknown to the petitioner, had agreed to let narcotics agents install a radio transmitter in the vehicle. The statements were overheard by an agent and were admitted in evidence over the objections of petitioner. The court of appeals affirmed the conviction.

The Supreme Court reversed, and in so doing stressed its decision of Spano v. New York, 360 U.S. 315 (1959), wherein a state court conviction was overturned because of the admission of a confession obtained after the defendant's indictment. Four concurring Justices had pointed out in Spano that "the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help." In the present case, the Court felt that the use of the incriminating statements denied petitioner the basic protection of the Sixth Amendment "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." The Court stressed the fact that it was not ruling on the propriety of continuing surveillance of petitioner while he was free on bail, but only that his own incriminating statements, obtained under these circumstances, could not be used against him.

In Escobedo v. Illinois, 378 U.S. 478 (1964), the failure to honor Escobedo's request to consult

with his lawyer during the course of an investigation was held to be a denial of the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

When Escobedo was interrogated by the police about the murder of his brother-in-law the police refused both his repeated requests to confer with his attorney and his attorney's attempts to see him. He admitted implication in the murder, was convicted, and the Illinois Supreme Court affirmed the admission of his statement.

The Supreme Court reversed and remanded, holding that it made no difference that the interrogation was conducted before Escobedo was formally indicted. It was the Court's view that when Escobedo requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved crime." The Court pointed out that the police had not informed him of his absolute right to remain silent, and declared that the "guiding hand of counsel" was essential to advise him of his rights.

In sum, the Court held that when the process of criminal law enforcement shifts from investigatory to accusatory, when its focus is on the accused and its purpose is to elicit a confession, our adversary system begins to operate and the accused must be permitted to consult his lawyer.

As a predicate for discussing whether or not these cases have any applicability to the

income tax area, an outline of the general investigative procedures of the Internal Revenue Service is in order.

The first contact with a taxpayer is often made by an Internal Revenue Agent whose duties involve the auditing of returns to determine the correct tax liability. If he finds indications of fraud, he refers the matter to his superiors who, if the facts justify such action, contact the Intelligence Division. A special agent may be assigned to look into the matter. He may informally interview the taxpayer (on a voluntary basis), contact third parties, and examine records. There may be other contacts with the taxpayer. The taxpayer is always free to consult or call in his attorney.

If the subsequent investigation develops evidence to warrant an Intelligence Division finding that a crime was probably committed and that the taxpayer probably committed it, the taxpayer is usually afforded the opportunity to appear with his attorney at a formal conference. Having completed his investigation, a special agent submits a report wherein he analyzes available data and makes a recommendation. If he has recommended prosecution and the Assistant Regional Commissioner (Intelligence) agrees, the matter is forwarded to one of our Regional Counsel.

At this point the case is accorded its first plenary legal review to determine if the evidence is sufficient to establish guilt beyond

a reasonable doubt and whether there is a reasonable probability of conviction. The taxpayer is usually offered a conference, whereat he is apprised of his rights under the Fifth and Sixth Amendments, advised of the Intelligence Division recommendation and the general procedure for reviewing criminal tax cases, and afforded the opportunity to make a statement.

If Regional Counsel concludes that the case should be prosecuted, he makes an appropriate recommendation and forwards it to the Department of Justice. Thereafter, until final disposition of the criminal case, the Internal Revenue Service generally takes no further investigatory action except with the approval of the Department of Justice.

For further information as to the aforestated investigative and review procedures see Kostelanetz and Bender, Criminal Aspects of Tax Fraud Cases (August 1957); Balter, Tax Fraud and Evasion (3rd Ed., 1963); Schmidt, Legal and Accounting Handbook of Federal Tax Fraud (1963).

With this background, it becomes clear that Massiah and Escobedo have no across-the-board applicability in the area of criminal income tax investigations.

In view of the fact that the incriminating statements in Massiah were secured after indictment, that decision should have virtually no effect on the investigative techniques of our agents in the income tax area. In contrast to

the factual setting of Massiah, it is extremely unlikely that a special agent in an income tax investigation will be confronted with a situation where one member of a criminal conspiracy has been indicted and thereafter he must perform further investigation to develop evidence relative to unknown individuals.

In regard to Escobedo, we note that the Court, in determining that Escobedo's Constitutional rights were violated, commented:

> "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. * * * It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." (Emphasis added.) (pp. 485, 486.)

In reversing the conviction, the Court stated:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the

> police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution * * *." (Pp. 490-491.)

The Supreme Court thus predicated its decision upon the presence of certain specific circumstances. Our reaction to these factors is that: (1) the circumstance of a known crime needing only the perpetrator's identity is simply not present in tax investigations; (2) the accusatory stage is reached in a criminal tax case only at the moment of arrest or upon the return of an indictment or filing of an information; (3) a taxpayer during the course of an inquiry into his tax affairs is not, barring an arrest, physically within the power of the special agent, nor is he, even if interrogated under the authority of a summons, inevitably under coercive pressure unless he knows of his right to remain silent or to have the assistance of counsel; and (4) a request to consult with an attorney is never denied by the Internal Revenue Service--to the contrary, and although there is no requirement to do so, a taxpayer is specifically advised at various stages during the processing of a criminal tax case of such right.

Undoubtedly the Escobedo and Massiah decisions may cause some disagreement both as to their precise scope and their effect on present criminal investigatory procedures. See 78 Harv. L. Rev.

217 (1964); 26 U. Pitt. L. Rev. 151 (October 1964); 33 U. Cin. L. Rev. 523 (Fall 1964); 14 DePaul L. Rev. 187 (Autumn-Winter 1964); 3 Duquesne U. L. Rev. 102 (Fall 1964); 48 Marq. L. Rev. 247 (Fall 1964); 38 So. Calif. L. Rev. 156 (1965); 9 St. Louis U. L. J. 281 (Winter 1964).

In sum, and in view of the investigative procedures described herein, we do not believe that the decisions are applicable in the income tax area. Accordingly, our procedures have not been changed nor do we expect to encounter any administrative difficulty in applying the rationale of said cases.

Inasmuch as the manuals used by the Internal Revenue Service are for intra-agency use only and are not available for public perusal we regret that we are unable to furnish specific citations thereto. However, we have referenced for your consideration several books wherein is discussed the role of a special agent in criminal tax investigations.

It is hoped that the foregoing will be of assistance.

Very truly yours,

Mitchell Rogovin

MITCHELL ROGOWIN
Chief Counsel

We would be interested in receiving a copy of your law review comment upon publication

MR

APPENDIX B

U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
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MAY 27 1965

Mr. Duane W. Krohnke
Office of the Editor
The University of Chicago Law Review
Chicago 37, Illinois

In re: Application of Massiah and Escobedo to Income Tax Investigations

Dear Mr. Krohnke:

This replies to your May 10 request for elaboration on our statement that "although there is no requirement to do so, a taxpayer is specifically advised at various stages during the processing of a criminal (income) tax case of such right (to counsel)."

Numerous cases support the proposition that there is no duty resting upon an investigating special agent to warn a taxpayer that he does not have to testify against himself or to give any information that might be used against him, and the relevant inquiry is limited to whether the information has been understandingly and willingly given. United States v. Frank, 245 F.2d 284 (3rd Cir. 1957) cert. den. 355 U.S. 819; Hanson v. United States, 186 F.2d 61 (8th Cir. 1950); Turner v. United States, 222 F.2d 926 (4th Cir. 1955) cert. den. 350 U.S. 831; Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955); United States v. Sclafani, 265 F.2d 408 (2nd Cir. 1959) cert. den. 360 U.S. 918.

The latest decision so holding is United States v. Spomar, 339 F.2d 941 (7th Cir. 1964), cert. den. ___ U.S. ___ (1965). This case is of particular importance in that the court rejected the defendant's argument that information, even though voluntarily given, could not be introduced into evidence against him because he had no knowledge of his constitutional right to refuse to furnish such information. Defendant contended that the mere lack of knowledge of his constitutional rights was enough to vitiate the voluntary surrender of his records. In denying such assertion the court indicated that to hold otherwise would bind the Government by defendant's subjective state of mind which is not subject to proof, and would stand for the untenable proposition that one who has no duty to advise a taxpayer of his constitutional rights may nevertheless be held responsible for taxpayer's ignorance of such rights. This case was decided six months after the Escobedo decision. The Seventh Circuit apparently did not consider that the factual setting before it fell within the purview of Escobedo.

The Spomar holding is that Escobedo does not require a special agent to voluntarily advise a taxpayer of his Fifth Amendment right against self-incrimination. The Spomar rationale would similarly support the proposition that, despite the Supreme Court's holding in Escobedo that a Sixth Amendment "right to counsel" exists under certain circumstances during an investigation, an agent is under no duty to voluntarily advise a taxpayer of it.

Irrespective of this interpretation of Spomar, it is the general practice of the Intelligence Division that a taxpayer be advised in criminal income tax cases of his right to counsel when offered the opportunity to attend an interview with officials of that Division at the conclusion of the investigation. Similarly, he is orally advised of such right when meeting with representatives of Regional Counsel's office. This practice is, of course, predicated solely upon a recognition of the administrative desirability to apprise an individual of his right to counsel as contrasted with any legal requirement to do so. Obviously, under certain circumstances (e.g., where the taxpayer is known to have retained counsel or is himself an attorney) explicit advice of right to counsel may be inappropriate.

Regarding your proposed Law Review comment, we have no objection to your quoting from, or referring to, correspondence received from this office.

It is hoped that the foregoing will be of assistance.

Very truly yours,

MITCHELL ROGOVIN
Chief Counsel

MOTION FILED

AUG 1 1966

FILE COPY

No. 965

In The Supreme Court of The United States

OCTOBER TERM, 1965

GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING

Pursuant to Rules 42 and 58 of the Revised Rules of the United States Supreme Court, the undersigned hereby moves this Court for leave to file the attached Amicus Curiae Brief in support of Petition for Rehearing in the above entitled action.

Said Motion is made on the ground that the attached Brief raises matters not previously argued by the parties which matters are believed to be relevant to the Court's determination of whether to grant rehearing in the above case. Counsel's interest is grounded in a deep concern for the Constitutional Rights of taxpayers

accused of crime and the conviction that the rights of such persons have not received adequate protection from the courts. Additionally, the undersigned is counsel for T. Kimball Hill in the case of Hill v. United States, 346 F. 2d 175 (9th Cir. 1965) cert. denied 382 U. S. 956 (1965), a matter which involves issues substantially similar to those in the above action.

/s/ JAMES O. HEWITT

Counsel on Amicus Curiae Brief

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 965

GEORGE KOHATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Amicus Curiae Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Amicus Curiae Counsel herein prays that this Court grant rehearing of its order of June 20, 1966, denying George Kohatsu's petition for writ of certiorari, 34 U.S. L. Week 3429, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled action as prayed for in the petition for certiorari filed in behalf of petitioner Kohatsu on January 28, 1966.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The holding of this Court in Miranda v. Arizona, 34 U.S. L. Week 4521 (June 13, 1966) makes it imperative that a decision be rendered on the constitutionality of the investigative procedures employed by the Internal Revenue Service in tax fraud cases.

In the previous petitions filed with this Court on behalf of Petitioner George Kohatsu, it was pointed out that a very real problem of great practical and constitutional importance today is that of effectuating the constitutional rights of taxpayers charged with criminal fraud. In a very real sense, the taxpayer has become the forgotten man of our system of criminal law. As was pointed out, the difficulty stems fundamentally from the fact that the typical tax fraud prosecution develops in a manner significantly different from that of other crimes. Consequently, the considerable body of law which has developed over the years and which is aimed at protecting the rights of the criminally accused, has been of little help to the taxpayer in fraud cases.

The crucial issue in this regard can be summarized in one sentence: What is an "intentional" and "knowing" waiver of rights within the meaning of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) and Miranda v. Arizona, 34 U.S. L. Week 4521 (June 13, 1966)? Or, stated otherwise, can there be an "intentional relinquishment or abandonment of a known right or privilege," in a situation where the facts indicate that the accused had no actual knowledge of the existence of his rights, or of how to effectuate them? Such, it is submitted, was the precise situation confronting George Kohatsu and such,

it is suggested, is the case with the overwhelming proportion of criminally accused taxpayers.

In spite of the clear admonition of this Court in Johnson v. Zerbst that a constitutional guarantee is not waived unless there is "an intentional relinquishment or abandonment of a known right or privilege," lower courts have nonetheless insisted on finding supposed "waivers" on the part of taxpayers in numerous cases where knowledge of constitutional rights or of the consequences of their waiver was largely lacking. Such a view of the law, it is believed, is totally inconsistent with the holdings of this Court in Johnson v. Zerbst, Escobedo v. Illinois, 378 U.S. 478 (1964) and particularly Miranda v. Arizona, where the Court noted at page 4532 that:

> "This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation."

The decision of this Court in Miranda has, it is submitted, proclaimed with finality that there can be no such thing as an "unknowing waiver" of constitutional rights. In Miranda this Court made imminently clear that when a person is interrogated in circumstances which may render his apparent cooperation something less than a free and knowledgeable act of the will, that good sense and good constitutional law require that he be first warned of his rights and be given an opportunity to intelligently exercise them.

The Miranda decision was, of course, geared to the

type of interrogation which is common to the overwhelming body of criminal prosecutions; i.e., the jail house interview in the course of which the accused, after being arrested by the police, is brought to the station house and subjected to various psychological pressures aimed at exhorting admissions from him.

The Miranda decision does not purport to deal with the somewhat different situation in which the criminally accused taxpayer finds himself. Unlike the ordinary criminal accused, the taxpayer charged with a crime is almost never arrested. He is seldom confronted by anyone whom he recognizes as a criminal agent and he rarely sees the inside of a jail -- at least not until after conviction. Yet, for all of this, the taxpayer accused of crime has as much compulsion to involuntarily cooperate with governmental authorities as does his brethren who are being interrogated in the police station.

In the case of the person being "grilled" at the station house, he is at an admittedly great disadvantage in that the police have him confined and are in a position to induce cooperation by various oppressive psychological techniques. But, one thing he does know for certain is that he is being interrogated by criminal investigators whose aim is to convict him of a crime. To this extent, at least, he knows the problems he faces and can take steps to resist the interrogation. The taxpayer, on the other hand, though generally not subjected to a jailhouse confinement, is in a very real sense at an even greater disadvantage due to his lack of awareness of the fact that he is under criminal investigation. The psychological pressures on such a person are immense for the very reason that lack of knowledge of the nature of the investigation deprives the taxpayer of the one great

incentive which motivates the ordinary accused, namely, the instinct of self-preservation which inclines every person to naturally resist those who accuse him of crime.

Stated differently, why should it be a more pardonable practice for a Special Agent of the Internal Revenue Service to obtain a taxpayer's cooperation by knowingly and intentionally keeping him uninformed of his rights and even uninformed as to the nature of the proceeding against him, than it is for a policeman to obtain the cooperation of the accused in the station house by keeping him uninformed of his rights in those circumstances. In both cases, the methods employed are equally an affront to the dignity of the person accused and in neither case is the cooperation "free" and "knowing" in the sense these terms are used in Miranda.

The Miranda decision unquestionably sets out a philosophy of law aimed at protecting the person accused of crime from inadvertently waiving his inviolate constitutional rights. As Miranda points out, no person should be convicted by evidence obtained from himself in an atmosphere which renders cooperation a bare mechanical act, devoid of meaning and substance. Yet, the cooperation of the taxpayer with a Special Agent of the Internal Revenue Service is just exactly that.

Because the average taxpayer is totally unaware of the distinction between a "general agent" and a "special agent" and usually is not even aware that there exists a criminal division of the Internal Revenue Service, the possibility of the taxpayer "knowingly" and "freely" waiving his constitutional rights in such circumstances is slim indeed. The fact that a plainly dressed individual

carries credentials identifying himself as a "Special Agent of the Intelligence Division of the Internal Revenue Service" is totally unenlightening to the taxpayer and of no help whatever in informing the accused of his rights, or even of the nature of the investigation. Yet, for all of this, courts have complacently gone on throughout the years, finding that the taxpayer has "knowingly" and "freely" waived his rights by cooperating with the Special Agent.

Such decisions, it is believed, are totally at odds with both the holding and the intent of Miranda and, therefore, it is of the utmost importance that the Court grant certiorari in the above case in order to resolve and clarify once and for all the constitutional status of those thousands of Americans who every year are investigated for violations of the criminal tax laws.

CONCLUSION

It is up to this Court to determine in the final analysis whether the taxpayer accused of crime is to continue as a second class citizen of our legal system or whether his constitutional rights will receive the same protections accorded the rights of others. Only by granting certiorari in a case such as this can the Court make this vitally important determination. It is respectfully submitted, therefore, that the Court reconsider its order denying certiorari and grant the rehearing petitioned for.

/s/ JAMES O. HEWITT
Counsel on Amicus Curiae
Petition

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of this Court.

/s/ JAMES O. HEWITT